ISMAIL IBRAHIM & ORS.

v.

SUM POH DEVELOPMENT SDN. BHD. & ANOR.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CIVIL SUIT NO. 22-34-86]
8 FEBRUARY 1988

CIVIL PROCEDURE: *Amendment of writ and statement of claim - Fraud alleged - Opposed by 2nd defendant - Principles of amendments of pleadings - Exceptions in case of alleging fraud - Overreaching - Tactical manoeuvre.*

On 27 May 1986, the plaintiffs commenced an action against the defendants for a declaration that the sale of a piece of land known as Lot 2841, Mukim 13 North East District, Penang (the said land) to the 1st defendant was null and void and that they are the owners of the said land free from any charge registered in favour of the 2nd defendant. In the statement of claim, the paragraphs merely pray for reliefs against the 1st defendant and a declaration against 2nd defendant which appears to be consequential. On 22 April 1987 plaintiffs filed an application to amend the writ and statement of claim by pleading fraud against the 2nd defendant which was opposed. The matter was heard first and the 2nd defendant's application to strike out the writ was adjourned to another date.

Held:

[1] The original writ and statement of claim contains no specific allegation of reliefs against the 2nd defendants but merely prayed an item consequential of the specific prayer for a declaration against the 1st defendant.

[2] The considerable delay here is viewed in the light of these following factors *viz* that in all probability, plaintiffs could not have succeeded in the original pleading and the delay was connected to the outcome of another case of *Hajah Rajiah* (the 2nd defendant had applied to remove the caveat on ground that there was no cause of action and succeeded) amounting to "tactical manoeuvre".

[3] Facts giving rise to this plea of fraud were known to the plaintiffs or their solicitors much earlier as seen from circumstances of this case.

[4] Even though the cases of *Yamaha* and *Atkinson* have crystalized the principle governing amendments of pleadings first enunciated in *Clarapede*, they are not without exceptions. In case of adding fraud, they cannot be allowed if facts giving rise to the plea of fraud were all known earlier or where the delay was in connection with some tactical manoeuvre.

[Application for leave to amend dismissed with costs. Costs to 1st defendants.]

Cases referred to:

Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. [1983] CLJ (Rep) 428
Lawrence v. Lord Norreys [1888] ChD xxxix 213
Clarapede Co. v. Commercial Union Asscn [1883] 32 WR 262
Atkinson v. Fitzwalter [1987] WLR 201

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 9, O. 20 r. 5(1)

Other sources referred to:
Supreme Court Practise 1985, p. 346 para. 20/5-8/22
The Cambridge Law Journal (1987), p. 232

For the applicants/plaintiffs - Lim Heng Han; M/s. Johari, Goh & Associates
For the 1st defendant/respondent - G Krishnan; M/s. Krishnan & Co.
For the 2nd defendant/respondent - Gerard Chan Weng Yew; M/s. Lim Kean Siew

JUDGMENT

Mohamed Dzaiddin J:

Decision on Enclosure 14

This is an application by the plaintiffs for leave to amend their writ of summons indorsed with the statement of claim under O. 20 r. 5(1) of the Rules of the High Court 1980.

Mr. Gerard Chan, Counsel for the 2nd defendant objected to this application as affecting his client. One would have thought that since the decision of the Federal Court in *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. & Ors.* [1983] CLJ (Rep) 428 any application for amendments made in our Courts would as a matter of course be granted. Alas, this is not so and we shall shortly see why in the present application it should not be so.

Let me briefly state the background to the present application. On 27 May 1986 the plaintiffs commenced an action against the defendants for a declaration that the sale of a piece of land known as Lot 2841, Mukim 13, North East District, Penang ("the said land") to the 1st defendant was null and void and that they are the owners of the said land free from any charge registered in favour of the 2nd defendant. It will be seen from their statement of claim that their claim and the prayer seeking relief against the 2nd defendant are pleaded in the following manner:

> 10. Upon the promise and covenants by the 1st defendant to deliver the said houses duly completed fit for immediate occupation and land to plaintiffs or their nominees the plaintiffs duly executed and transferred the said property to the 1st defendant, the said memorandum of transfer was duly registered at this Registry of Land Titles on 23 August 1980.
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> 11. Without notice to and on consent of the plaintiffs, the 1st defendant wrongfully charged the said property to Tai Cheng Finance Bhd. the 2nd defendant abovenamed as security for a loan of RM700,000 granted by the 2nd defendant to the 1st defendant.

The prayer against the 2nd defendant reads as follows:

(a) The said sale of Lot 2841 Mk. 13, MED, Penang be declared null and void;

(b) A declaration that the plaintiffs are the owners of the said property freed and discharged of the charge in favour of the 2nd defendant;

(c) ...

(d) Damages

Pausing here, it should be observed that the above paragraphs merely pray for reliefs against the 1st defendant and a declaration against the 2nd defendant appears to me to be consequential.

On 14 July 1986 the 2nd defendant entered an appearance. Soon after the entry of an appearance, the 2nd defendant through their solicitors filed an application by summons-in-chambers on 8 July 1986 for an order that the said writ indorsed with the statement of claim be struck out under O. 18 r. 19 of the Rules of the High Court 1980 as it discloses no reasonable cause of action against them. Unfortunately, this application failed to get the immediate attention of the High Court registry and was not fixed for hearing until about one year after the filing date when suddenly the solicitors were informed that the matter had been fixed on 20 July 1987.

In the meantime, on 22 April 1987 the plaintiffs filed the present application and hearing was fixed on the same day as the 2nd defendant's application for striking out writ. However, in view of this application for amendment requiring to be heard first, the latter application has been adjourned to another date.

In the present application, the plaintiffs proposed to amend their writ and statement of claim by pleading fraud against the 2nd defendant. The proposed new paras. 11A and 13A read as follows:

> 11A. The plaintiffs aver that the said charge and/or its registration was obtained by fraud and/or collusion of the 2nd defendant with the 1st defendant. The 2nd defendant or its agent(s) is a party of privy to the said fraud.
>
> ***Particulars***
>
> (i) The 2nd defendant had knowledge or ought reasonable to have knowledge of the existence of the agreement dated 5 December 1979 and/or agreements dated 17 October 1979 before the abovesaid loan and charge transactions were entered into.
>
> (ii) The 2nd defendant knew or ought to know that the 1st defendant had no authority to charge the said property. The 2nd defendant knew or ought to have known that the 1st defendant at all material times had only paid to account of the purchase price the sum of RM2,000 only and that the balance purchase price of RM798,000 had not been paid for.
>
> (iii) When the 1st defendant approached the 2nd defendant for the said loan sometime before 17 October 1979, the 2nd defendant knew or ought to have known from its investigation and/or inquiries that the plaintiffs were still the registered owners of the said property.
>
> (iv) The 2nd defendant had known or ought to have known of the sale of the said houses and land to the plaintiff's nominees.
>
> (v) The 2nd defendant knew that the repayment of the said loan by the 1st defendant was to come from the proceeds of sale of the houses in the said housing scheme.
>
> (vi) The 2nd defendant knew or ought reasonably to have known that the 1st defendant as developers of the said housing scheme had sold and was bound by contract of sale to give a good title free from encumbrance to purchasers of houses in the said scheme which include the plaintiffs.

(vii) notwithstanding the knowledge and/or notice abovesaid, the 2nd defendant went ahead to enter into the loan and charge transactions with the 1st defendant.

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13 ...

13A. And the plaintiffs pray against the 2nd defendant for the following orders and/or reliefs:

(a) A declaration that the plaintiff are the owners of the said property freed and discharged of the charge against the 2nd defendant;

(b) That the charge in favour of the 2nd defendant be deleted and expunged from the Register Document of Title of the said property;

(c) Damages;

(d) Costs;

(e) Such further and other reliefs.

Mr. Chan, in his submission, opposed this application on the following grounds. First, the plaintiffs in their affidavit in support affirmed by the solicitor, Mr. Foong Kai Choong, did not disclose any reasons for the amendments, other than stating that the original claim did not specifically set out the plaintiffs' claim, the remedy and reliefs which they are entitled to seek against the defendants and that the defendant would not incur any injustice. According to Mr. Chan in any amendment to plead fraud, the plaintiffs should disclose their reason if any, why it was omitted earlier. [*Lawrence v. Lord Norreys* [1888] Ch D XXXIX 213].

Secondly, the plaintiffs had taken a long time to file their application. The 2nd defendant verily believed that the plaintiffs were waiting for a decision in another case where the 2nd defendant, as the registered chargee, had applied to remove a caveat against certain land on the ground that there was no cause of action against them. The decision was handed down on 21 August 1986 whereby the Court allowed the 2nd defendant's application. (See: *Hajah Rajiah bte. Haji Man v. Tai Cheng Finance Berhad* [1987] CLJ (Rep) 618).

Thirdly, from the facts and circumstances, the application was not *bona fide*.

Fourthly, there was no cause of action against the 2nd defendant and there was no relief prayed against them in the original statement of claim. Counsel submitted that had his application to strike out the writ and statement of claim under O. 18 r. 19 Rules of the High Court been heard earlier than the present application, the 2nd defendant would have been successful and the plaintiff could not have made this application.

Mr. Lim for the plaintiffs, relied on the principles of *Yamaha* (*supra*) and submitted that the application was made *bona fide* to include the issue of fraud in the pleading. Some of the facts were not known earlier to the plaintiffs.

The general principle of amendments of pleadings has clearly been enunciated in *Yamaha* following some of the well-known English cases decided for over a century. In *Clarapede & Co. v. Commercial Union Association* [1883] 32 WR 262, 263 Brett MR stated as follows:

> The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without prejudice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them in such a position that they must be injured it ought not to be made.

In *Yamaha,* the appellant applied for leave to amend the amended statement of claim which would have the effect of pleading fraud or unlawful conspiracy after the pleadings were closed. The Federal Court in allowing the appellant's application stated that the rule governing the amendment of pleadings is that the Court will allow such amendments as will cause no injustice to the other parties. It says that three basic questions should be considered to determine whether injustice would or would not result:

1) whether the application is made *bona fide*;

2) whether the prejudice caused to the other side can be compensated by costs and

3) whether the amendments would not in fact turn the suit from one character into a suit of another and inconsistent character. If the answer are in the affirmative an application for amendment should be allowed at any stage of the proceeding.

Since *Yamaha,* the English Courts have had occasions to restate the rule governing amendments of pleadings for the purpose of adding a plea of fraud. The commentary in the *Supreme Court Practise 1985* under 20/5-8/22 at p. 346 which reads as follows:

> Fraud, adding allegation of - Although it has been stated that it is "the universal practice, except in the most exceptional circumstances, not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance" (per Lord Esher MR in *Bentley v. Black* [1893] 9 TLR 580; of *Hendricks v. Montagu* [1893] 17 Ch D 638, p. 642; *Symonds v. City Bank* [1885] 34 WR 364; *Lever v. Goodwin* [1887] WN 107, CA) yet such an amendment is allowed at an early stage; and in special circumstances at the trial though an adjournment would usually be granted, see *Riding v. Hawkins* [1889] 14 PD 56. But such an amendment should not be allowed by the Court of Appeal (Bradford etc., *Building Society v. Borders* [1941] 2 All ER 205).

In *Atkinson v. Fitzwalter* [1987] 1 WLR 201 the plaintiff claimed damages from the defendants, alleging that words published by them in a television programme broadcast in June 1984 were defamatory of him. In October 1984 the defendants served a defence in which they denied that the words complained of referred to or were understood to refer to the plaintiff, or that in their natural and ordinary meaning the words were defamatory of him. In April 1986, shortly before the action was due to be tried, the defendants applied for the case to be stood out of the list and for leave to amend their defence to plead justification and fair comment, the effect of which would be to justify the plaintiff's complaint that the programme alleged fraud against him. The Judge granted the defendant's applications.

On appeal by the plaintiff it was held by the Court of Appeal that, as a general principle, a party to litigation should be permitted to amend his pleadings at any stage in order that all matters in controversy between the parties should be before the Court, provided that to do so would not cause injustice to other parties which could not be adequately compensated in money; that there was no rule that allegations of fraud had to be pleaded at the outset and could not be added by amendment; and that, accordingly, the Court in the exercise of its discretion could grant a defendant to a defamation action leave to

amend the defence to plead justification and fair comment even though the plea was added in circumstances where the plaintiff was alleging that the meaning of the words used amounted to an allegation of fraud.

Stocker LJ, in his judgment at p. 219, identifies two circumstances in which an amendment to add an allegation of fraud would not be permitted. "Where the facts giving rise to the plea of fraud were all known at the time of the original pleading and certainly where the failure to plead such facts could amount to "overreaching" or where the delay in pleading fraud was in connection with some tactical manoeuvre." *The Cambridge Law Journal* (1987) at p. 232 has described the above decision as "a decision remarkable for its consistent adherence to the principles ... The Court of Appeal held that amendments involved allegations of fraud could be made at a late stage. It would appear that this decision will be effective in sweeping away many inconclusive cases."

In the present application, after having examined the facts and circumstances my findings are as follows:

1) The original writ and the statement of claim, *prima facie*, do not contain any specific allegation of reliefs against the 2nd defendants. Whatever was prayed in para. 13(b) in the statement of claim appears to be consequential of the specific prayer for a declaration against the 1st defendant.

2) There has been considerable delay on the part of the plaintiffs to make this application. The amendments should be allowed however late the proposed amendment is, if it can be made without prejudice to the opposite party. However, in the present application, one has to view the question of delay in the light of the following factors. First, can the plaintiffs succeed in their claim against the 2nd defendant on the original pleading? In all probability, they cannot. They would have faced the same problem and obstacle as the respondent in *Hajah Rajiah* (*supra*) had the 2nd defendant's application under O. 18 r. 19 been heard within a reasonable period after the said application was filed and before the present application. Secondly, their delay in filing this application must have something to do with the outcome of the decision in *Hajah Rajiah*. Hence, this application for amendment was made to avoid the original writ and the statement of claim from being struck out. It is this situation that Stocker LJ called "tactical manoeuvre".

3) Looking at the original claim, it is quite obvious that the facts rise to the plea of fraud were known to the plaintiffs or their solicitors much earlier. Clearly, the plaintiffs' cause of action is based on a written agreement for the sale of the property by them to the 1st defendant, a housing developer. The 1st defendant had defaulted in the payment of the balance of the purchase price. However as a set-off and in lieu of the payment of the balance, the parties entered into another agreement whereby the 1st defendant would transfer to the plaintiffs few units of the duly completed houses and certain portion of the said land designated for further development. The plaintiffs now alleged that while these agreements were in existence, the 1st defendant charged the entire property to the 2nd defendant as security for a loan of RM700,000 given by the 2nd defendant to the 1st defendant and that the 2nd defendant should have known about them. That being the position the plaintiffs or their solicitors must equally be aware of the charge had a land office search been made. I cannot accept Mr. Lim's submission that the facts were not

known to the plaintiffs or they had inadvertently omitted to plead in the original claim. Even the supporting affidavit of the plaintiffs did not depose anything to this effect.

4) Finally, it is as clear as day to me that both *Yamaha* and *Atkinson* have crystalized the principle governing amendments of pleadings which was first enunciated in 1883 in *Clarapede* (*supra*). They are however not without exceptions. In the case of adding fraud, according to Stcoker LJ in *Atkinson* (*supra*) they cannot be allowed if the facts giving rise to the plea of fraud were all known earlier or where the delay was in connection with some tactical manoeuvre. In the present case, Mr. Chan has succeeded in persuading me to accept the exceptions identified by Stocker LJ as being relevant.

Therefore, for the above reasons, I must disallow the plaintiffs' application for leave to amend their pleading with costs. In addition, I give costs to the 1st defendants.

Also found at [1988] 2 CLJ 632